IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 733

J. HARVIE WILLIAMS, JULIUS PRUFER, EDWARD WEST, JR., CECIL C. HATFIELD, ROBERT A. PECK, BERNARD W. FREUND, GRACE T. SEAT, GRAYSON G. FENTRISS, WILLIAM GROSSMAN, and JOE E. SWIGER, all citizens of the United States resident in Virginia,

Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, L. STANLEY HARDAWAY, Secretary, MILLS E. GODWIN, JR., Governor of the Commonwealth of Virginia, and MARTHA BELL CONWAY, Secretary of the Commonwealth of Virginia,

Appellees

On Appeal From the United States District Court for the Eastern District of Virginia, at Alexandria

JURISDICTIONAL STATEMENT

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On Appeal From the United States District Court for the Eastern District of Virginia, at Alexandria

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JURISDICTIONAL STATEMENT

Appellants appeal from the Order on Opinion of a Three Judge Court entered on July 16, 1968, in the United States District Court for the Eastern District of Virginia, at Alexandria. The Order denied, after notice and hearing, the permanent injunction against

the appellees, prayed for in the appellant's Complaint, that would have enjoined, on constitutional grounds, the enforcement, operation or execution by the appellees of certain provisions of the State election statutes of Virginia: (a) that impose the general ticket system of electing, on a state-wide basis, *all* electors of the President and Vice President of the United States to be elected in Virginia; and (b) that prevent the election of the "representative" electors of the President and Vice President in single-member national (Congressional) districts solely by the people residing in the respective district voting as citizens of the United States, as Representatives in Congress are elected.

This appeal is brought by the following ten citizens of the United States who are residents one of each of Virginia's ten Congressional districts, as indicated by the district number following each name, and who, as plaintiffs in the court below, brought the legal proceeding as a class action in behalf of all citizens of Virginia similarly situated: J. Harvie Williams, *8th*, Julius Prufer, *6th*, Edward West, Jr., *3rd*, Cecil C. Hatfield, *9th*, Robert A. Peck, *10th*, Bernard W. Freund, *2nd*, Grace T. Seat, *5th*, Grayson G. Fentriss, *1st*, William Grossman, *4th*, and Joe E. Swiger, *7th*. Appellants seek a review on this appeal by this Honorable Court of all portions of the final Order on Opinion that dropped the Governor of Virginia as a party defendant, that denied the prayers of the Complaint for a declaratory judgment and for a permanent injunction against the appellees in their official character, as shown above, and dismissed the complaint, that ordered that the defendants recover of the plaintiffs the costs of the action, and that ordered that the action be stricken from the docket.

The appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Opinion of the Three Judge Court in the United States District Court for the Eastern District of Virginia, at Alexandria, is reported in 288 Fed. Supp. 622 Copies of the Opinion, the Order on Opinion, and the Notice of Appeal are attached hereto as Appendix (Pages 1a-14a). For the Convenience of the Court, a copy of the Complaint as filed by the appellants is attached hereto as Appendix (pages 15a-33a).

JURISDICTION

1. This suit was brought by the appellants under Article III, Section 2 of the Constitution of the United States and under the provisions of 28 U.S.C.A. 1331 (federal question), 28 U.S.C.A. 1343, 42 U.S.C.A. 1983, 42 U.S.C.A. 1988 (deprivation of rights of citizens), 28 U.S.C.A. 2201, 28 U.S.C.A. 2202 (declaratory judgment), and 28 U.S.C.A. 2281 and 28 U.S.C.A. 2284 (three judge court for injunction against enforcement of a state statute on constitutional grounds), and the Constitution of the United States. Some of the particular sections of the Constitution under which the action was brought are: Article II, Section 1; the apportionment provisions of Article I, Section 2, and of the Fourteenth Amendment, Section 2; the provisions of the Privileges and Immunities Clause, of the Due Process Clause, and of the Equal Protection Clause of the Fourteenth Amendment, Section 1; and the provisions of the Twelfth Amendment, of the Constitution.

The action was brought to challenge the constitutional validity of certain provisions of the State election statutes of Virginia relating to the election of electors of the President and Vice President, namely: Section 24-7, Chapter 1 of Title 24 of the Code of Virginia providing that each voter may vote for one elector from each Congressional district of the state; and Sections 24-290.4 to 290.6, Chapter 11.1 of Title 24 of the Code of Virginia providing for a uniform official ballot throughout the state on which qualified voters can only designate their preference by marking a square preceding the name of a particular political party or group of their choice and for ballots so marked to be counted as if squares preceding the names of each of the individual electors of the respective group or party had been so marked.

The Complaint also questioned the constitutional validity of these statutes insofar as they deny to Plaintiffs the right and opportunity to select one elector in each of Virginia's ten Congressional districts exclusively by the votes cast in that respective district.

2. The Opinion and the Order on Opinion sought to be reviewed on this appeal were entered on July 16, 1968 by the Three Judge Court in the United States District Court for the Eastern District of Virginia at Alexandria. Appellants' Notice of Appeal, which seeks to review all portions of the Order on Opinion, was filed on September 12, 1968 in said United States District Court for the Eastern District of Virginia at Alexandria.

3. The jurisdiction of the Supreme Court to review the decision and Order on Opinion entered in this case by direct appeal is conferred by Title 28 United States Code, Sections 1253 and 2281.

4. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: Davis v. Mann 377 U.S. 678, 84 S.Ct. 1441 1964); Reynolds v. Sims, 377 U.S. 533. 84 S.Ct. 1362 (1964); Anderson v. Martin, 375 U.S. 399, 84 S.Ct. 454 (1964); Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526 (1964); Ray v. Blair, 343 U.S. 214, 72 S.Ct. 654 (1952); St. John v. Wisconsin Employment Relations Board, 340 U.S. 411, 71 S.Ct. 375 (1951).

5. The provisions of the State election statutes involved in this appeal are cited as: Section 24-7, Chapter 1 of Title 24 of the Code of Virginia, found at page 202 of Volume 5 (1964 replacement volume); Section 24-290.4, Chapter 11.1 of Title 24 of the Code of Virginia, found at page 283 of Volume 5 (1964 replacement volume); and Section 24-290.5, Chapter 11.1 of Title 24 of the Code of Virginia, found at page 283 of Volume 5 (1964 replacement volume). These sections respectively read as follows:

> **"Section 24-7 Electors for President and Vice President.**—There shall be chosen by the qualified voters of the Commonwealth, at the election to be held on the Tuesday after the first Monday in November, nineteen hundred and forty eight, and at elections to be held on the Tuesday after the first Monday in November in each fourth year thereafter, so many electors for President and Vice President of the United States as this State shall be entitled to at the time of such election under the Constitution and laws of the United States. Each voter may vote for one elector from each congressional district of the State, as the same shall be constituted and apportioned for the election of representatives in the Congress of the United States from this State at the time when

such election shall be held, and for two electors from the State at large; and, if at the time of choosing electors, the law shall provide for one or more representatives from the State at large in the Congress, each voter may at such election vote for such number of electors from the State at large (in addition to the two hereinbefore provided for) as shall correspond with the number of such representatives at large, so that the whole number of electors to be chosen at any election shall always be equal to the whole number of senators and representatives to which the State may at that time be entitled in the Congress.

"Section 24.290.4 How ballots to be prepared.— It shall thereupon be the duty of the State Board of Elections immediately to so notify the secretary of the electoral board of each county and city of the State, and to certify to each said secretary the form of official ballot which shall be uniform throughout the State. It shall become the duty of the electoral board of each of the several counties and cities within the State, at least forty days preceding such election, to cause to be printed on the uniform official ballot provided for in this section, and in Chapter 11 of this title, the name of each said political party and the party name specified by the persons naming electors by petition, and underneath or below the party name in parenthesis the words "Electors for ..... President and ..... Vice President" with the blanks filled in with the names of the candidates for President and Vice President for whom said candidates for electors are expected to vote in the Electoral College, after which the names of the electors nominated by said political parties or groups or petitioners shall follow; and to print a square preceding the name of each such party and party designation."

"Section 24-290.5 How ballots to be marked.— The qualified voters at said election shall designate

their preference for candidates for electors of President and Vice President by marking, as provided in § 24-245, the square preceding the name of the political party or party name of his choice, and the ballots so marked shall be counted as if squares preceding the names of the individual electors nominated or selected by such political parties or the group of petitioners had been so marked."

QUESTIONS PRESENTED

1. Is a State election statute, which establishes the state-wide general ticket system for electing those electors of the President and Vice President who are apportioned to the people as Representatives in Congress are, unconstitutional as violating the rights of citizens of the United States?

2. Does the Constitution of the United States require that the "representative" electors of the President and Vice President apportioned to the people be elected in single-member national districts, as their counterpart Representatives in Congress are elected?

3. Do the duties to be performed by the Governor of a State, in determining and certifying the names of the persons elected as presidential electors, make the Governor of Virginia a necessary or proper party defefendant in this action?

STATEMENT

On April 1, 1968, the 10 appellants herein filed a Complaint in the United States District Court for the Eastern District of Virginia, at Alexandria, as a class action against the Virginia State Board of Elections, its Secretary, the Governor of Virginia, and the Secretary of the Commonwealth of Virginia. A copy of the Complaint is attached hereto as Appendix, at

pages 15a-33a. The Complaint challenged the constitutionality of certain provisions of the Virginia State election statutes, Section 24-7, Chapter 1 of Title 24, and Sections 24-290.4 and 24-290.5 of Chapter 11.1 of Title 24, of the Code of Virginia, as set forth above, and prayed for a declaratory judgment and for a permanent injunction to enjoin the enforcement, operation or execution of certain portions of such provisions of Virginia's election statutes.

The 10 appellants, who brought this suit as plaintiffs, are citizens of the United States each resident in, and a duly qualified and registered voter in, a different one of the 10 national (Congressional) districts of Virginia. They brought the action as a class action on behalf of themselves and in behalf of all other citizens of the United States similarly situated who, like themselves, planned to participate in the election of the President and Vice President of the United States by voting in the election of presidential electors.

On April 8, 1968, the appellants filed a motion for designation of a Three Judge Court, together with points and authorities. On April 9, 1968, Judge Oren R. Lewis requested designation of a Three Judge Court. On April 15, 1968, Chief Judge Clement F. Haynsworth, Jr., of the United States Court of Appeals for the Fourth Circuit entered an Order designating a Three Judge Court to hear and determine the constitutional issues raised in said action. On April 24, 1968 the appellees filed a Motion to dismiss.

On April 29, 1968, a Pre-Trial Order was entered establishing a procedural schedule and setting the date for hearing on the merits and all motions on

June 25, 1968. On May 7, 1968, the appellees filed an Answer which simply denied the material allegations of the Complaint. On May 9, 1968, the appellants, as plaintiffs, filed a Motion for Summary Judgment.

On May 28, 1968, appellants filed plaintiffs' Brief before hearing on the merits, upon defendants' motion to dismiss and upon plaintiffs' motion for summary judgment. On June 5, 1968, appellants filed their list of witnesses and proposed exhibits. On June 11, 1968, appellees, as defendants, filed objections to certain of plaintiffs' proposed exhibits solely on grounds of alleged immateriality, but waived formal proof. On June 11, 1968, an Order was entered advancing the date of the hearing to June 24, 1968. On June 13, 1968, the appellees, as defendants, filed their Brief, and on June 20, 1968, a Brief for amicus curiae was filed. Also on June 20, 1968, appellants, as plaintiffs, filed their Reply Brief.

On June 24, 1968, trial proceedings were held as the case came on for hearing on the merits and on all motions, and arguments were heard, before the panel of three judges who took the case under advisement. On June 26, 1968, appellants, as plaintiffs, filed an affidavit together with two exhibits.

On July 16, 1968, the panel of three judges issued its Opinion, ruling that the state-wide general ticket system of election of all presidential electors from a state is but another form of the unit rule and that, notwithstanding its "disfranchisement" of voters and other "objectionable results", the Constitution permits it to be adopted by a state legislature.

The Court, in its Opinion, also stated that the "State unit system's cancellation of a State's minority votes

causes inequities and distortions of voting rights among citizens of the several states, isolating the effects of votes cast by persons of a particular political persuasion or party in one State, from those cast by voters of the same persuasion or party in other States." Nevertheless the Court ruled that "disparities of this sort", "this unevenness", and "the injustice" thereof "cannot be corrected by suit, especially one in which but a single State is impleaded." See Pages 11a-12a.

Stating that the merits and advantages of plaintiffs' thesis are readily recognizable, the Court's Opinion concludes that "the change to a district system would not . . . warrant Virginia or any other State to adopt an individual plan. Whatever the pattern, to succeed it must be nation-wide. As was aptly stated by Professor Robert G. Dixon, ' . . . any modification of the electoral college system should be on a uniform national basis in order to avoid creating additional inequities on an interstate basis'."

Notice of Appeal was filed by appellants on September 12, 1968. See page 13a-14a.

Among the material facts proved in the case are the following:

1. In the 1960 election, the popular vote in Virginia for the Republican nominee was only 52.4 per cent, and the Democratic nominee received 47 per cent of the vote cast, but the Republican nominee received 100 per cent of the 12 electoral votes from Virginia and the Democratic nominee received none.

2. If the "representative" electors had been elected by single-member districts in Virginia, in 1960 the Republican nominee would have received 9 electoral

votes from Virginia and the Democratic nominee would have received 3 electoral votes from Virginia.

3. In the 1964 election, the popular vote in Virginia for the Democratic nominee was 53.5 per cent and for the Republican nominee was 46.2 per cent, but the Democratic nominee received 100 per cent of the 12 electoral votes from Virginia and the Republican nominee received none.

4. If the "representative" electors had been elected by single-member districts in Virginia, in 1964 the Democratic nominee would have received 8 electoral votes from Virginia and the Republican nominee would have received 4 electoral votes from Virginia.

5. Of the 435 Congressional districts and corresponding "representative" electors in the nation, the number of national (Congressional) districts that were *won* in recent national elections of electors of the President and Vice President by one party's nominee, but were *lost* to the other party's nominee by the overriding state-wide elections, were as follows:

	Presidential Elections			
	1964	1960	1956	1952
By Democrats	9	43	64	82
By Republicans	29	103	17	15
Total Districts *won*, but *lost* by state-wide election	38	146	81	97

6. A citizen of New York participates in, and influences, the election of 43 presidential electors of which 41 are "representative" electors *apportioned* to the people in New York; while a citizen of Virginia participates in, and influences, the election of only 12 presidential electors of which 10 are "representative" electors *apportioned* to the people in Virginia.

THE QUESTIONS ARE SUBSTANTIAL

The decision of the Court below in this case is the first decision of any court in the land that rules, after hearing on the merits, that a State election statute, that imposes the state-wide general ticket system of electing *all* of the presidential electors to be elected in the State, is constitutional.

This is a substantial and serious ruling that the Constitution of the United States permits a State election law to deprive citizens of the United States of any right to have an effective vote in the national election of the President "in their capacity as citizens of the United States". As stated in the lower Court's Opinion, the state-wide general ticket system's "cancellation of States' minority votes cause *inequities* and *distortion* of voting rights among citizens of the several states, by *arbitrarily isolating* the effects of votes cast by persons of a particular political persuasion or party in one State, from those cast by voters of the same persuasion or party in other States."

The general ticket system allows the voters in the States to vote "only as citizens of the State," and denies them any voice on a national scale as citizens of the United States. Moreover, it defeats the fundamental constitutional principle of representation of people, not just voters, on the basis of national districts of essentially equal numbers of people, with each such district having one "representative" elector. This basic principle of representation of people as citizens of the United States by units of essentially equal numbers in national districts is established in the Constitution by the apportionment provisions of Article I and of the Fourteenth Amendment, Section 2. By the provisions

of Article II, Section I those apportionment provisions are made to apply as apportionments of "representative" electors in the same, and inseparable, way as the apportionments of Representatives in Congress thereunder.

At various points in their Opinion, the lower Court recognizes, or acknowledges in one form or another, that the state-wide general ticket system, or the unit rule to which it is equated by the Court:

1. "accords no representation among the electors to the minority of the voters."
2. "Admittedly, . . . does not produce a group as representative of the people as would an election of one elector by each district alone."
3. "If plaintiffs' contention for single-elector district voting had prevailed, it would have been possible for the Democratic and Republican parties to have had a proportionate representation among Virginia's electors in the same degree as they shared in the state-wide tally."
4. "Concededly, its (the general ticket system's or unit rule's) effect is exceptionable in many aspects."
5. Involves, among possible objectionable results:

   "disfranchisement of voters";

   "not only extinguishes the voice of State minorities, but it allows State majorities to speak for them";

   "exhaust(s) the power of millions of individual votes at the State level before the election is actually determined at the national level. They lose their effect on the outcome at a preliminary stage in the counting. These votes are disfranchised in the sense that their votes have no bearing on the

national electoral vote totals which determine the winner."

"deprivations";

"discrimination against the minority voters";

"inequality in the ballot's worth";

"cancellation of State's minority votes (that) causes inequities and distortions of voting rights among citizens of the several states";

"disparities";

"unevenness";

"injustice".

It is submitted that each of these conditions resulting under the State election law creating the general ticket system is of substantial significance in the life of the nation and its people under the Constitution and the form of government under it. The correction of these inequities is particularly vital to our people and our government in the current era when so many people in the various walks of life seem to have lost confidence in our government as being a "government for the people and by the people."

The greater degree of representation of the people as citizens of the United States in the election of the President and Vice President envisaged in the election of "representative" electors apportioned to the people by single-member national districts should not be denied them by State statute. The "unit rule", to which the lower Court equates the state-wide general ticket system, has been discredited in the view of the people by the action of the National Convention of the Democratic Party taken at Chicago this year, which discarded the unit rule as being not representative.

It is submitted that it is an abuse of discretion by the Court below to fail to grant equitable relief from the many glaring inequities suffered by the appellants and others similarly situated. The lower Court's Opinion recognizes that the provision of Article II, Section 1, of the Constitution that each State shall "appoint, in such manner as the Legislature thereof may direct," is "subject to possible constitutional limitation," and cites *Ray* v. *Blair,* 343 U.S. 214, 72 S. Ct. 654 (1952). The lower Court then states "In short, the manner of appointment must itself be free of Constitutional infirmity." Indeed, it is believed that the recent case in the Supreme Court in which it was ruled that the Ohio state laws that severely restricted the ability of potential candidates for President (George C. Wallace in that case) to have their names appear on the ballot in Ohio for the election of their designated electors place unconstitutional obstacles in the way of candidates, appears further to confirm that State election statutes enacted with respect to the election of electors of the President are subject to constitutional scrutiny by the Courts. (The official name and citation of the report of that case has not become known to appellants at the time of this writing).

The lower Court erroneously relies, for its inaction, upon the unnecessary dictum in the case of *Wesberry* v. *Sanders,* 376, U.S. 1, 7, 84 S. Ct. 526 (1964), that the rule, that as nearly as is practicable one man's vote in a congressional election is worth as much as another's, is followed automatically "when Representatives are chosen as a group on a state-wide basis." In the first place, this cannot be said of the election of electors of the President if one regards the "representative" electors at least as officers to be elected by the

citizens of the United States in a nation-wide election of the highest national officers of the country. As shown above, and as found by the lower Court, one United States citizen's vote in one state is not worth as much as another's in another State in presidential elections. In the second place the Court's statement about state-wide elections of Representatives as a group does not appear to have been necessary for the Court to reach the rule of the case. Moreover, in contradiction of that statement, see the majority opinion by Justice Frankfurter in *Colgrave* v. *Green,* 329 U.S. 549, 553, 66 S. Ct. 1198, 1200 (1964); and the comprehensive statement of Senator Benton of Missouri in 1824 in 41 Annals of Congress 169-170 and quoted in Lucius J. Wilmerding's article entitled "Reform of the Electoral System" in the March 1949 issue of the Political Science Quarterly. House Report No. 909, 27th Congress, 2nd Session, entitled "Apportionment Bill" and dated July 16, 1842 sets forth John Quincy Adams' view that the election by single-member districts is "the *only* mode by which the principle of representation, in proportion to *numbers* can be carried into execution".

The *Wesberry* case simply rules that Congressional districts must be essentially equal in numbers of people. It was decided under provisions of the Constitution that establish the structure of the Government, with consideration necessarily placed upon the significance of the apportionment provisions thereof.

It is respectfully submitted that the instant case can and should be decided on the basis of a fair and proper interpretation of similar provisions that establish the structure of the government, also with emphasis placed

upon the significance of the apportionment provisions thereof. These apportionment provisions have caused the number of "representative" electors to be elected in New York to decrease from 45 in 1948 to 41 in 1964 and in California to increase from 23 in 1948 to 38 in 1964. This establishes clearly that such "representative" electors belong to the people as citizens of the United States, not to the States as organized political entities, since they follow the requisite numbers of people to form a national district and to have a Representative in Congress and a "representative" elector.

The language of Article II, Section 1, does not, under a reasonable and careful interpretation of its terms and other provisions of the Constitution, give the "representative" electors to the States as organized political entities, and the state's legislature do not have unlimited power in effectuating the state's appointment of such electors of the President.

A. The Word "State" in Article II, Section I, Means Only the Geographic Area and the Inhabitants Thereof, Not the State as an Organized Political Entity.

Article II, Section 1, of the Constitution provides:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; . . . ."

Under our Constitutional system of dual representation in Congress, the Senators represent the States as organized political entities, which are entitled to them; but the Representatives in Congress represent the people who are entitled to them under the apportionments according to the numbers of persons. See quotation in

Wesberry v. *Sanders,* 376 U.S. 1, 12-14, 83 S. Ct. 526, 532-533 (1964) from William Samuel Johnson, "in one branch the *people,* ought to be represented; in the *other,* the *States.*" The States, as organized political entities, accordingly are not "entitled to" the Representatives in Congress.

The statement "the whole Number of Senators and Representatives to which the State may be entitled in the Congress," therefore, requires that the word "State" therein can mean only the geographic area and the inhabitants thereof, and not the organized political entity. With this meaning, the clause is an accurate statement, because the geographic area and the inhabitants thereof are entitled to the Representatives directly and are also entitled to the Senators through their organized political entity.

Throughout the Constitution, the word "State" frequently means only the geographic area and the inhabitants thereof, and not the organized political entity. A few of the many examples of this are:

1. In the first sentence of Section 2, Article I: "People *of* the several States"; and "Electors *in* each State".

2. In the second sentence of Section 2, Article I: "Inhabitant of that State *in* which he shall be chosen".

3. In the third sentence of Section 2, Article I: "Representatives and direct taxes shall be apportioned *among* the several States which may be included within this Union, according to their numbers, . . ."

4. In the fifth sentence of Section 2, Article I: "When vacancies happen in the Representation *from* any State,"

5. In the first sentence of Section 4, Article I: "The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed *in* each State by the Legislature thereof;".

Moreover, the state legislature is generally regarded as the supreme authority of the state, as an organized political entity. If the word "State" in "Each State shall appoint" were to mean the organized political entity, the words "in such Manner as the Legislature thereof may direct" would be wholly unnecessary. The phrase would, in that case, be redundant, since the organized political entity would have been granted the full power to appoint in any manner it should choose by the first four words standing alone.

It is submitted, therefore, that the drafters of the Constitution meant the word "State" in Aricle II, Section 1, to mean only the geographic area and the inhabitants thereof. Then the succeeding words "in such manner as the Legislature thereof may direct" serve a purpose. That purpose is not to establish a substantive right in apposition to the substantive right already created in the geographic area and the inhabitants thereof. That purpose is to provide a means of determining a procedure by which the respective geographic area and the inhabitants thereof shall appoint the electors to which they are entitled.

B. Procedural Authority in Legislature May Not Defeat Substantive Rights of Citizens to "Representative" Electors

The words "in such manner as the Legislature thereof may direct" by their very nature, relate only to procedure. In view of this fact and the foregoing construction of the words of Section 1, it follows that

the acts of the state legislatures under such procedural authority should be limited under the Constitution to the enactment of procedures that conform with, and do not defeat, the substantive rights of the people inherently created, and actually operative, in the full context of the provisions of Article II, Section 1.

Those substantive rights of the people are granted to the inhabitants of the respective geographic area by the proper meaning of "State" in the words "Each State shall appoint". Those substantive rights of the people are further confirmed and established by the actual operative effect of the provisions establishing the apportionment of "representative" electors (as distinguished from "senatorial" electors) according to the numbers of persons, which is inseparably bound to the apportionment to the people of Representatives in Congress.

CONCLUSION

There have been many attempts to amend the Constitution with regard to the election of the President over the last 150 years to overcome many of the inequities in it. Although the district method of election of electors, which was followed by a number of the states prior to 1836, has come closest to receiving the necessary two-thirds vote of both houses on several occasions, history convinces one that it seems almost impossible to obtain the necessary two-thirds vote of both houses on this subject in view of the factional strength in Congress of some of the political leaders from some of the larger states.

It is submitted that the questions raised in this proceeding are substantial and of greatest public im-

portance, as shown above. The need for equitable relief is great since the failure of the people as citizens of the United States to have fair and due representation in the election of their President and Vice President constitutes an irreparable injury to the people. It is believed that a fair and proper interpretation of the provisions of the Constitution establishing the structure of the national government, coupled with other significant provisions of the Constitution, support the position asserted by appellants and the power and authority of the Supreme Court to rule that the state-wide general ticket system of election of "representative" electors is unconstitutional. A finding of such unconstitutionality can be based, among other possible constitutional grounds, upon a constitutional requirement that "representative" electors of the President apportioned to the people be elected in single-member districts, as their counterpart Representatives in Congress are elected under the Apportionment Act of 1929, 2 U.S.C.A. 2a, as amended by Act of December 14, 1967, P.L. 90-196, 81 Stat. 581.

A ruling by the Supreme Court to the effect prayed by appellants in their Complaint and in this appeal, of course, can be made to apply effectively as to all states having more than one Representative. Indeed, it would appear that the lower Court's inability to make its order effective as to all such other states may have strongly influenced its decision.

It is submitted that the importance to the citizens of the United States of the questions presented is so substantial as to require plenary consideration, beyond the presentations possible or appropriate in this filing,

and to call for briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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November 12, 1968

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

At Alexandria

Civil Action No. 4768-A

J. HARVIE WILLIAMS, ET AL., *Plaintiffs,*

v.

VIRGINIA STATE BOARD OF ELECTIONS, ETC., ET AL., *Defendants.*

(Argued June 24, 1968 Decided July 16, 1968)

Before BRYAN, *Circuit Judge,* and LEWIS and MERHIGE, *District Judges.*

Howard S. Spering, of Washington, D. C., who argued the case for the plaintiffs; with whom was associated Robert L. Montague, III, of Alexandria, Virginia;

Robert Y. Button, Attorney General of Virginia; Robert D. McIlwaine, III, Assistant Attorney General; and Richard N. Harris, Assistant Attorney General, who argued the case for the defendants.

Opinion

ALBERT V. BRYAN, Circuit Judge:

Presidential electors provided for in Article II of the Constitution of the United States cannot be selected, plaintiffs charge, by a statewide general election as directed by the Virginia statute.[1] Under it *all* of the State's electors are collectively chosen in the Presidential election by the greatest number of votes cast throughout the entire State,

[1] Code of Va., 1950, Section 24-7. quoted infra. The same general plan now prevails in every State.

instead of choosing them by Congressional districts, *one* elector for each, exclusively by the votes cast in that district.

Unfairness is imputed to the plan because it gives the choice of *all* of the electors to the statewide plurality of those voting in the election—"winner take all"—and accords no representation among the electors to the minority of the voters. An additional prejudice is found in the result of the system as between voters in different States. We must reject these contentions.

The Constitution provides for the election of the President and Vice President by electors in these words:

Article II

"Section 1. . . . He [the President] shall . . . together with the Vice President . . . be elected, as follows:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; . . . ."

Article XII [Twelfth Amendment]

"The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; . . . ."

Plaintiffs' proposition is advanced on three counts: (1) the intendment of Article II, Section 1, providing for the appointment of electors is that they be chosen in the same manner as Senators and Representatives, that is two at large and the remainder by Congressional or other equal districts; (2) the general ticket method violates the "one-person, one-vote" principle of the Equal Protection Clause of the Fourth Amendment, i.e., the weight of each citizen's vote must be substantially equal to that of every other citizen. Gray v. Sanders, 372 US 368, 381 (1963); Wesberry v. Sanders, 376 US 1, 18 (1964); and (3) the general ticket system gives a citizen in a State having a larger number of electors than Virginia the opportunity to effectuate by his vote the selection of more electors than can the Virginian. On these bases the plaintiffs pray for a declaration that the Virginia statute is invalid and for an injunction against its use by the defendant State election officials.

The Code of Virginia, 1950, Section 24-7 directs:

> "§ 24-7. Electors for President and Vice President. —There shall be chosen by the qualified voters of the Commonwealth, . . . at elections to be held on the Tuesday after the first Monday in November in each fourth year [after 1948], so many electors for President and Vice President of the United States as this State shall be entitled to at the time of such election under the Constitution and laws of the United States. Each voter may vote for one elector from each congressional district of the State, as the same shall be constituted and apportioned for the election of representatives in the Congress of the United States from this State at the time when such election shall be held, and for two electors from the State at large; . . . ."

Congress has prescribed that henceforth the Representatives from each State, when more than one, be chosen by districts, 2 USC 2a, 2c. Similar provision is made by Ar-

ticle IV, Section 55 of the Constitution of Virginia as well as by statute, Code of Va., Section 24-4. Virginia has ten Representatives besides two Senators. Save to analogize the selection of electors with the selection of Senators and Representatives the plaintiffs make no point, of course, against the election statewide of the two electors corresponding to the Senators. Our discussion, therefore, will refer solely to those electors who are the counterparts of Representatives in Congress.

Throughout, it must be kept constantly in mind that the wisdom of the continued use of the electoral college for choosing the President and Vice President is not at issue here. As here posed the question recognizes the predominance of that Constitutional design. The inquiry is whether Article II, Section 1 considered alone or with Constitutional safeguards, permits the selection of the electors by a general election in which the entire electorate of the State may collectively vote at one time upon all of the electors.

Plaintiffs are ten in number, one from each of the Congressional districts of Virginia, and all of them qualified to vote in their respective districts in the coming fall election. Their brief describes their purpose:

> "This action is brought to protect and restore the full benefit of plaintiffs' right to vote. Plaintiffs seek to elect one presidential elector in, and solely by a plurality of the votes cast in, their own respective Congressional districts. They seek thereby to prevent the dilution of their own votes, and the denial of any possibility of their having any electoral representation when not part of the state-wide plurality, that now result from counting the votes of all voters throughout the state in determining the plurality of votes for the election of the one presidential elector that has been apportioned to the people resident in their respective Congressional district by virtue of their numbers.

> Thus, they seek to prevent the votes of residents in other Congressional districts of Virginia from being counted in determining the plurality of votes for the election of one presidential elector in, by, and from their own respective Congressional district."

We think they have the requisite standing to maintain the suit they plead; that it is an acceptable class action; that the defendants, save the Governor of Virginia, are proper parties, as the officials entrusted with the conduct of the election of presidential electors; and that this court has jurisdiction of the complaint. Flast et al. v. Cohen, Secretary of Health, et al., 36 L.W. 4601 (June 10, 1968); 28 USC 1343; 42 USC 1983; 42 USC 1988; Baker v. Carr, 369 US 186 (1962); Gray v. Sanders, 372 US 368 (1963); Wesberry v. Sanders, 376 US 1 (1964); Reynolds v. Sims, 377 US 533 (1964); F.R.Civ.P. 23. Because of its special circumstances, we do not think Penton v. Humphrey, 264 FSupp 250 (S.D.Miss. 1967—3-judge court) dictates rejection of the present action; nor do we believe on reading of the pleadings in State of Delaware v. State of New York, 385 US 895 (1966), cited by the defendants, that it forecloses entertainment of plaintiffs' plaint.

I. The first argument of the plaintiffs is that the college of electors was envisaged by the Constitution as delegates of the people—although to exercise their own judgment—in naming the President and Vice President, thus according the people a truer representation in the choosing of these officers. The electors, they aver, were to be as directly and immediately representative of the people as the college method permitted.

To this extent and to this end, a voice in selection of the President and Vice President, the argument is, was avouched the people in the same measure as is assured them in picking members of the legislative branch of the Federal government. If, continue plaintiffs, Representatives in

Congress are—in fairness to the people—chosen by districts, so should be electors.

Primary citation for this position is the parallelism drawn by the Constitution in the numerical correspondence of electors with the State's total of Senators and Representatives. This conformity is marked also by the requirement of varying the number of electors as the number of Representatives change.

Admittedly, the designation of all presidential electors by the ballot of all who voted throughout the State does not produce a group as representative of the people as would an election of one elector by each district alone. For instance, as the plaintiffs demonstrate, while in 1960 the popular vote in Virginia for the Republican nominee was only 52.4%, and the Democratic nominee received 47%, of the vote cast, the Republican was credited with 100% of Virginia's electoral votes and the Democrat with none. With the popular count reversed, the candidates in 1964 were favored and unfavored in electoral votes by the same formula. If plaintiffs' contention for single-elector district voting had prevailed, it would have been possible for the Democratic and Republican parties to have had proportionate representation among Virginia's electors in the same degree as they shared in the statewide tally.

Many of the Brahmins of the Constitutional Convention, such as Thomas Jefferson, James Madison and James Wilson, held the district plan more advisable. Indeed, Virginia and several of the other States for some years chose electors by district. However, it was Jefferson who advised Virginia to switch to the general ticket. His advice sprang from a desire to protect his State against the use of the general ticket by other States. He found that when chosen by districts, Virginia's representation among the electors was divided, while other States made their votes mean more

in the college by adoption of the general ticket scheme of selection. This contention is no less true today.[2]

Thus, it cannot be safely said that the draftsmen of Article II, Section 1 believed that the electors must be chosen by congressional or other districts, as plaintiffs here contend. The clause literally leaves to the State legislature the appointment of electors "*in such manner*" as it may direct. Bestowal of this discretion is emphasized in McPherson v. Blacker, 146 US 1 (1892). There the history of Article II is so fully traced that repetition of it may well be omitted. Nevertheless, that decision did no more than hold permissible and valid Michigan's determination to select electors by districts. Anything in the opinion appearing to rule on the acceptableness of some other plan is obiter; it is not authority for the assertion that the manner a State legislature adopts to appoint electors is beyond judicial review.

II. On the contrary, in our opinion the authorization of each State by Article II to "appoint, in such manner as the Legislature thereof may direct," is "subject to possible constitutional limitations". Ray v. Blair, 343 US 214, 227 (1952). In short, the manner of appointment must itself be free of Constitutional infirmity.

It is on this premise that plaintiffs, in their second argument, ask us to declare the general ticket system invalid as "debasing, abridging or misrepresenting the weight of the votes of citizens of the United States in presidential elections unconstitutionally". Principal reliance for this argument is the "one-person, one-vote" doctrine announced in Gray v. Sanders, supra, 372 US 368, 381 (1953) and reaf-

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[2] For a comprehensive and thoughtful disquition upon the election of electors, consult Peirce, *The People's President* (1968), and the Memorandum of the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, October 10, 1961.

firmed in Wesberry v. Sanders, supra, 376 US 1, 18 (1964). Clearly, these decisions do condemn any such trespass. Reynolds v. Sims, 377 US 533, 555 (1964).

However, in our judgment the general ticket does not come within the brand of these decisions. Actually, the system is but another form of the unit rule. A familiar application is in the casting of a constituency's single vote by its several delegates in a convention. It also appears in Article II (Twelfth Amendment) making provision for the election of the President by the House of Representatives when no majority is obtained in the electoral college. Representatives cast the vote of their State according as the greater number of them vote.

We see nothing in the unit rule offensive to the Constitution. Concededly, its effect is exceptionable in many aspects. Some are enumerated in the Memorandum of the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, at p. 22, supra footnote 2. Among possible objectionable results it listed disfranchisement of voters and the possibility of "minority presidents", that is one having a majority of electoral votes but not having a larger count in the popular vote than one of his opponents. Added to these detractions is the greater opportunity for the creation of "splinter" parties.

Discussing the disfranchisement defect, the Memorandum continues, p. 23, in this language:

> "Above the minimum of three, additional electoral votes to which a State is entitled are based upon population. Nevertheless as much as 49 percent of a State's voters may see the portion of its electoral votes attributable to them cast for a candidate whom they oppose. It is not merely that their votes are wasted in the sense that they were cast for a loser. The unit

rule not only extinguishes the voice of State minorities, but it allows State majorities to speak for them. . . .

* * * * *

"Some defenders of the unit-rule system dispute the logic of this argument. They answer that no votes are lost when validly cast in an election; that they are actually counted toward the final decision and if, insufficient for victory, they have simply exhausted their power as votes.

"However, the effect of the unit rule is to exhaust the power of millions of individual votes at the State level before the election is actually determined at the national level. They lose their effect on the outcome at a preliminary stage in the counting. These voters are disfranchised in the sense that their votes have no bearing on the national electoral vote totals which determine the winner.

"It is sometimes said that the thousands or millions of voters in a State whose candidate was defeated in its popular election might as well not have voted at all because the State's electoral vote would have gone the same way if they had stayed at home. This is not totally realistic. If they had not voted at all, one vote would have been sufficient to deliver the State's electoral vote for the opposing candidate. By voting, the minority party voters have set a figure which must be matched and exceeded by opposing voters before the State's electoral vote bloc is awarded to the opponent."

Many other reputable authorities have inveighed against the system when applied to the selection of electors. Their strictures include excoriation of the electoral college both as an original and current institution.

Notwithstanding, it is difficult to equate the deprivations imposed by the unit rule with the denial of privileges outlawed by the one-person, one-vote doctrine or banned

by Constitutional mandates of protection. In the selection of electors the rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes. This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidous. No such evil has been made manifest here. Every citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone.

Furthermore, adoption of the general election system in Virginia is grounded on what has historically been deemed to her best interests in the workings of the electoral college. The legislature of the Commonwealth had the choice of appointing electors in a manner which will fairly reflect the popular vote but thereby weaken the potential impact of Virginia as a State in the nationwide counting of electoral ballots, or to allow the majority to rule and thereby maximize the impact of Virginia's 12 electoral votes in the electoral college tally. The latter course was taken, and we cannot say unwisely.

Reverting to the unit rule, it has never been rejected as unfair in the election of members of the United States House of Representatives when two or more or all are running at large, that is statewide. In the midst of the one-person, one-vote decisions, this practice was noticed without any question of its validity. In Wesberry v. Sanders, supra, 376 US 1, 7, the Court said:

> "We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several states' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. This rule is followed automatically, of course, when Representatives are chosen as a group on

a statewide basis, as was a widespread practice in the first 50 years of our Nation's history." (Footnotes omitted.)

In this consideration it is notable that Congress, in its amendments of the statute relating to the election of Representatives by districts, has expressly countenanced the election of them from the "State at large". 2 USC 2a and 2c, supra. Presumably Congress would not have done so if it meant a breach of the one-person, one-vote principle, by then securely established. If the plan is legally permissible in the selection of Congressmen, it may hardly be stigmatized as unlawful in choosing electors.

III. Further instances of inequality in the ballot's worth between them as Virginia citizens, plaintiffs continue, and citizens of other States, exists as a result of the assignment of electors among the States. To illustrate, New York is apportioned 43 electors and the citizen there, in the general system plan, participates in the selection of 43 electors while his Virginia compatriot has a part in choosing only 12. His ballot, if creating a plurality for his preference, wins the whole number of 43 electors while the Virginian in the same circumstances could acquire only 12. Again, party-wise, it is alleged that on a national basis, the State unit system's cancellation of States' minority votes causes inequities and distortions of voting rights among citizens of the several States, by arbitrarily isolating the effects of votes cast by persons of a particular political persuasion or party in one State, from those cast by voters of the same persuasion or party in other States.

Disparities of this sort are to be found throughout the United States wherever there is a State numerical difference in electors. But plainly this unevenness is directly traceable to the Constitution's presidential electoral scheme and to the permissible unit system.

For these reasons the injustice cannot be corrected by suit, especially one in which but a single State is impleaded. Litigation of the common national problem by a joinder of all the States was evidently unacceptable to the Supreme Court. State of Delaware v. State of New York, supra, 385 US 895. Readily recognizing these impediments, plaintiffs point to the district selection of electors as a solution, or at least an amelioration, of this interstate inequality of voters. However, to repeat, this method cannot be forced upon the State legislatures, for the Constitution gives them the choice, and use of the unit method of tallying is not unlawful.

Adverting to certain procedural points made by the parties, the Governor of Virginia, in view of his detachment from the election machinery in the State, we find it neither a necessary nor a proper defendant here, and should be dropped as a party; we overrule all objections which have been reserved in the admission of evidence on the hearing of this cause.

The merits and advantages of the plaintiffs' thesis are readily recognizable. We do not discount or deride their motives, but we are of the opinion that a compulsory compliance with their demand or any other proposed limitation on the selection by the State of its presidential electors would require a Constitutional amendment. Also, we observe, that the change to a district system would not, for the reasons expressed by Jefferson, warrant Virginia or any other State to adopt an individual plan. Whatever the pattern, to succeed it must be nationwide. As was aptly stated by Professor Robert G. Dixon, ". . . any modification of the electoral college system should be on a uniform national basis in order to avoid creating additional inequities on an interstate basis."[3]

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[3] Remarks before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, July 14, 1967, regarding proposed amendments to the Constitution relating to nomination and election of the President and Vice President.

As Virginia's design for selecting presidential electors does not disserve the Constitution, we decline to place an injunction upon its effectuation. Plaintiffs' complaint will be dismissed.

Order on Opinion

Upon consideration of the pleadings, the stipulations of counsel, the exhibits and the entire record in this action, as well as the arguments thereon of counsel orally and on brief, the court for the reasons stated in its opinion filed herewith finds, adjudges and orders as follows:

1. That the Governor of Virginia be, and he is hereby, dropped as a party defendant herein;

2. That the prayers of the complaint be, and they are hereby denied, and that the complaint herein be, and it is hereby, dismissed; and

3. That the defendants recover of the plaintiffs the costs of this action, and nothing further remaining to be done in the cause, it be stricken from the docket.

ALBERT V. BRYAN
United States Circuit Judge

OREN R. LEWIS
United States District Judge

ROBERT R. MERHIGE, JR.
United States District Judge

Dated: July 16, 1968

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that J. Harvie Williams, Julius Prufer, Edward West, Jr., Cecil C. Hatfield, Robert A. Peck, Bernard W. Freund, Grace T. Seat, Grayson G. Fentriss, William Grossman, and Joe E. Swiger, all citizens of the United States resident in Virginia and being all of the plaintiffs herein, hereby appeal to the Supreme Court

of the United States from all portions of the final Order of Opinion, entered July 16, 1968 by the three-judge Court herein after a hearing, that dropped the Governor of Virginia as a party defendant herein, that denied the prayers of the complaint for a declaratory judgment and for a permanent injunction against the defendants and dismissed the complaint, that ordered that the defendants recover of the plaintiffs the costs of this action, and that ordered that this action be stricken from the docket.

II. This appeal is taken pursuant to 28 U.S.C.A. 1253 and the sixty-day rule for such appeals from a final judgment, order or decree, as provided in 28 U.S.C.A. 2101.

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September 12, 1968

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No.

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(7th Congressional District)

Plaintiffs

v.

VIRGINIA STATE BOARD OF ELECTIONS, L. STANLEY HARDAWAY, Secretary, Richmond, Virginia

MILLS E. GODWIN, JR., Governor of the Commonwealth of Virginia, Richmond, Virginia

MARTHA BELL CONWAY, Secretary of the Commonwealth of Virginia, Richmond, Virginia

Defendants

Complaint for Declaratory Judgment and for Injunctive Relief

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1. This is a class action for a declaratory judgment and for injunctive relief to declare the state-wide general ticket system, imposed by the Commonwealth of Virginia, for

electing those 10 of its 12 presidential electors whose offices exist solely by virtue of its having 10 Representatives in Congress, to be inequitable, distortive of citizens' votes, and unrepresentative of the people whose numbers establish the 10 Congressional districts into which Virginia is divided for the purpose of separate and distinct representation of the people in each such district in the United States House of Representatives; and to be illegal and unconstitutional under the provisions of Article II, Section 1, of the Constitution of the United States, and under the provisions of the Twelfth Amendment and of the Fourteenth Amendment of the Constitution of the United States, among other provisions thereof and of the United States Code.

2. This action invokes the provisions of the Privileges and Immunities Clause, of the Due Process Clause, and of the Equal Protection Clause, of the Fourteenth Amendment of the Constitution of the United States, and sections of the United States Code enacted in pursuance thereof, to protect and restore the full benefit of the plaintiffs' right to vote under said provisions of the Fourteenth Amendment and related sections of the United States Code, under the provisions of Article II, Section 1, of the Constitution, under the provisions of the Twelfth Amendment of the Constitution, and under the apportionment provisions of Section 2 of Article I of the Constitution and of Section 2 of the Fourteenth Amendment thereof, among other provisions of the Constitution of the United States and of the United States Code.

3. Jurisdiction of this Court exists under Article III, Section 2 of the Constitution of the United States, and under the provisions of 28 USCA 1331 (federal question), 28 USCA 1343, 42 USCA 1983, 42 USCA 1988 (deprivation of rights of citizens), 28 USCA 2201, 28 USCA 2202 (declaratory judgment), and 28 USCA 2281 and 28 USCA 2284 (three-judge court for injunction against enforcement

of state statute on constitutional grounds). The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000).

4. Plaintiffs herein are each citizens of the United States and citizens of, and duly registered voters under the laws of, the Commonwealth of Virginia. Plaintiffs are residents and duly qualified voters each of a different one of the ten Congressional districts of Virginia, and each of said districts is represented herein by one or more of the plaintiffs. Plaintiffs bring this action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, in behalf of themselves and in behalf of all other citizens of the United States, who are also residents and duly qualified voters of one of said Congressional districts of Virginia and who, like themselves, plan to participate in the election of the President and Vice President of the United States by voting in the election of presidential electors and have a common interest in protecting their individual and several voting rights in such elections, their right to effective representation therein, and the rights of representation therein of minors and others resident in their respective Congressional districts who are ineligible, or otherwise unable, to vote in such elections.

5. The defendants herein are Mills E. Godwin, Jr., Governor of the Commonwealth of Virginia, Martha Bell Conway, Secretary of the Commonwealth of Virginia, and the State Board of Elections, a separate and permanent board created within the office of said Secretary of the Commonwealth under Chapter 3 of Title 24, Elections, of the Code of Virginia (1946, p. 483; Michie Suppl. 1946, sec. 83a; 1948, p. 418; R.P. 1948, sec. 24-24; 1956, Ch. 392, et seq.).

6. The number of electors to be chosen in Virginia, under Article II, Section 1 of the Constitution of the United States, for the election of the President and the Vice President of the United States, is equal to the whole num-

ber or sum of its 2 Senators and the 10 Representatives to which it is entitled in Congress, the latter number being determined, pursuant to Article I, Section 2, and the Fourteenth Amendment, Section 2, of the Constitution of the United States, by apportionment among the several states according to their respective numbers, counting the whole number of persons in each state.

7. Under said Article II, Section 1, of the Constitution of the United States and said apportionment provisions of Article I, Section 2, and of the Fourteenth Amendment, Section 2, of the Constitution of the United States, the right to elect one elector, who is the counterpart of a Representative in Congress, lies, fundamentally and constitutionally, in the people based upon their numbers requisite to constitute a Congressional district, since the right to elect each such presidential elector follows the number of people requisite to entitle them to a Representative in Congress and to constitute a Congressional district under the national apportionment as they migrate from state to state or their numbers within a state otherwise increase or decrease disproportionately to the changes of population in other states.

8. Pursuant to Section 24-7, Chapter 1 of Title 24 of the Code of Virginia (Code 1919, sec. 74) and Sections 24-290.1 to 290.6, Chapter 11.1 of Title 24 of the Code of Virginia, in any election for President and Vice President of the United States, each (and every) voter in the State may vote "for one elector from each Congressional district of the State, as the same shall be constituted and apportioned for the election of representatives in the Congress of the United States. . . . . and for two electors from the State at large", and each political party, or other group of qualified voters, submitting a list of names of electors selected by them is expected to include therein "one elector residing in each Congressional district and two from the State at large."

9. Pursuant to Sections 24-290.4 to 290.6, Chapter 11.1 of said Title 24 of the Code of Virginia, the defendant State Board of Elections is required to certify to the Secretary of each local election board "the form of official ballot which shall be uniform throughout the State" and on said ballot shall be printed the name of each political party or group and under the party name in parenthesis the words "Electors for ..... President and ..... Vice President" with the names of the candidates filled in, after which the names of the electors nominated by said political party or group shall follow, and a square shall be printed preceding the name of each such party or group, in which the qualified voters shall designate their preference for candidates for electors of President and Vice President by marking the square preceding the name of the party or group of his choice, and ballots so marked shall be counted as if squares preceding the names of the individual electors nominated by the respective political party or group had been so marked. A true and correct copy of a sample of such uniform ballot used in Powhatan County for the 1964 election for President and Vice President, which is attached hereto, marked Exhibit A, and made a part hereof, clearly illustrates the practice under said provisions of Title 24 of said Code of Virginia.

10. Pursuant to Section 24-276 and Section 24-278, Chapter 11.1 of said Title 24 of the Code of Virginia, the person having the highest number of votes for any office shall be deemed to have been elected to such office and this applies to elections for the office of elector of President and Vice President of the United States. Such elector candidates, nominated by the State conventions of any such political party or group, shall be expected, if elected, to vote in the Electoral College for the presidential and vice presidential nominees of any national convention to which the said State convention elects delegates, as provided in Section 24-290.6 of said Chapter 11.1.

11. Under the foregoing election laws of Virginia, a state-wide general ticket system of voting for electors of President and Vice President is established and assured, with the result that all twelve (12) electors elected in Virginia are of one party or group only and, consequently, the state's 12 electoral votes are consistently cast, counted and certified in the Electoral College entirely for the one person for President and the one person for Vice President as nominated by the political party or group receiving the highest number of votes on a state-wide basis, notwithstanding the otherwise several and divisible character of 10 of the State's 12 electors and their electoral votes.

12. The several and divisible character of 10 of Virginia's electors and their electoral votes (a) is established under Article II, Section 1, of the Constitution of the United States and the apportionment provisions of Article 1, Section 2, and of the Fourteenth Amendment, Section 2, of the Constitution of the United States, as stated above in paragraph 7, (b) is clearly recognized by the provision of the State law, cited above in paragraph 8, that each (and every) voter in the State may vote "for one elector from each congressional district of the State, as the same shall be constituted and apportioned for the election of representatives in the Congress", and (c) is also recognized by the provisions of the Twelfth Amendment of the Constitution of the United States contemplating that a state's electoral votes will often be divided as to the persons voted for as President and as to the persons voted for as Vice President. A copy of the map showing the 10 Congressional districts of Virginia as printed in the Congressional Directory for the 90th Congress, Second Session, published January 1968, is attached hereto, marked Exhibit B, and made a part hereof.

13. As a result of the foregoing election laws and practices of Virginia, all voters in Virginia who shall have voted for the elector candidates of a political party or group

that receives less than the highest number of votes on a state-wide basis, are wholly without any representation by any electoral vote whatsoever in the Electoral College when the members of that body from Virginia vote for persons for President and Vice President of the United States,

(a) even if and when the number of such voters so voting may aggregate as much as forty-nine percent (49%) of the total of all popular votes cast in Virginia in such presidential election; and

(b) even if and when the number of such voters so voting shall aggregate and constitute a majority, or the highest number, of the popular votes cast in one or more of the 10 Congressional districts.

14. The foregoing statutes and practices of the Commonwealth of Virginia, are inequitable, illegal, and unconstitutional under Article II, Section 1, the Twelfth Amendment, and the Fourteenth Amendment of the Constitution of the United States in that plaintiffs are denied fair, equitable, proportionate, just, and reasonable representation and weight in the voting in the Electoral College by the electors from Virginia, since the weight of plaintiffs' votes, among all the popular votes cast in Virginia, will inevitably either

(a) be magnified and distorted, when on the winning side, from a plurality, however narrow the margin, to one hundred percent (100%) of Virginia's electoral votes; or

(b) be completely ignored and debased, when on the losing side, and be invidiously misrepresented as if supporting the winning plurality.

15. Under recent decisions of the United States Supreme Court the "one-man one-vote" principle of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States requires that, whenever and wherever in the United States voting by any of the people

is provided for in state or federal elections, the citizens of the United States are entitled to be fairly, justly, and equitably represented and effectively weighted, by district units fairly related to their numbers, in the outcome of such election; and they are entitled to have their right to vote protected against being abridged, debased, diluted, cancelled, destroyed, discriminated against on the basis of place or residence or on any other arbitrary basis, or otherwise made ineffective or unrepresentative, by or under any laws or practices of any state, or by or under any acts of any officials thereof or of any other persons. See Reynolds v. Sims et al., 377 U.S. 533, 554-568, 84 S. Ct. 1362, 1377-1382 (1964).

16. The right of citizens of the United States to vote for electors of President and Vice President of the United States, as recognized and dealt with in the provisions of Section 2 of the Fourteenth Amendment of the Constitution of the United States and in the provisions of the United States Code 42 USCA 1971, is parallel in such provisions and otherwise under the Constitution of the United States, in all essential respects, to the right to vote for Senators and for Representatives respectively, since the number of electors to be chosen from the respective states is declared in Article II, Section 1 of the Constitution of the United States to be the same as the number of Senators and Representatives to be elected by the people from the respective states, and the Twelfth Amendment of the Constitution of the United States clearly contemplates that the electoral votes of a state will often be divided as to the persons voted for as President and as to the persons voted for as Vice President, as would likely occur when one elector is elected in and by each Congressional district.

17. Election of one elector in each Congressional district solely by the citizens voting in the respective district, in the same manner as Representatives in Congress are elected in and by single-member districts as a consequence of the

aforesaid apportionment provisions of the Constitution, would assure that the election of the President and the Vice President will be based upon the same units of representation as are effective in the election of United States Senators and Representatives in Congress. Under these circumstances, the strangulation of Government that often has occurred in the past due to strongly divergent or conflicting policies of the Executive Branch and the Legislative Branch would be much less likely to develop.

18. The non-parallel, inequitable, unrepresentative and unconstitutional basis of electing the President and Vice President under the state-imposed, state-wide general ticket system of electing the electors of the President sets up, within the state and nationally among the states, a constituency for the Executive Branch altogether different from that of the Legislative Branch of the national Government, and can only operate in the direction of creating critical impasses between the two branches of Government. Plaintiffs as citizens of the United States are irreparably injured by the abridgement of their right to fair and just representation in, and of their right to have their votes effectively and fairly weighted in, the election of the President and Vice President. They are also immeasurably and irreparably injured when their national Government is thus strangled and ineffective in serving their interests, as expressed, on the one hand, through representation of the states and of the people in the two Houses of Congress, the Senate and the House of Representatives, and, on the other hand, through the distorted representation of the states only in the election of the President and Vice President.

19. The state-wide general ticket system of electing presidential electors in Virginia regiments the state's voters into a single state-wide count and a single voice for its voters expressed solely in their capacity as citizens of the state, and unconstitutionally contravenes, dilutes, and destroys all opportunity and right of its citizens to have any effec-

tive voice in their other capacity as citizens of the United States by having their votes counted separately in their own Congressional districts, as smaller, essentially equal national units, each electing, and effectively represented by, the one elector to which the state is entitled solely by reason of the whole number of persons residing within each such district. Congressional districts in each of the states are required to be as nearly equal in population as is practicable under the rule in Wesberry v. Sanders, 376 U.S. 1, 84 S. Ct. 526 (1964).

20. Such failure of Virginia to provide for election of presidential electors by and from each respective district, as is provided in the case of the election of Representatives in Congress, contravenes the basic structure of the Government of the United States, and the basic structure of the government of every state in the Union guaranteed under Article IV, Section 4, of the Constitution of the United States, as republican in form of government based on representatives of the people of the United States elected in each of their several essentially equal Congressional districts apportioned among the several states pursuant to Article I, Section 2, and the Fourteenth Amendment, Section 2, of the Constitution of the United States.

21. Said state-wide general ticket system of electing electors and the resultant casting of their electoral votes, imposed by the Commonwealth of Virginia, is illegal and unconstitutional in that it violates the "one-man one-vote" principle of the Equal Protection Clause, and other provisions of Section 1, of the Fourteenth Amendment of the Constitution of the United States, among plaintiffs and other citizens resident in Virginia, through the many distortions, debasements, restrictions, and other misrepresentations of their votes and of their right to vote, and through the many denials of constitutional representation of the whole number of people who constitute their respective Congressional districts, all as recited substantially in many paragraphs of this Complaint.

22. Said state-wide general ticket system of electing electors and the resultant casting of their electoral votes, imposed by the Commonwealth of Virginia and other states, is inequitable and unconstitutional in that it violates the "one-man one-vote" principle of the Equal Protection Clause, and other provisions of Section 1, of the Fourteenth Amendment of the Constitution of the United States, among plaintiffs and other citizens of the United States, by giving different weight in the election of President and Vice President of the United States to the votes of citizens of the United States who are residents of one state from the weight given to the votes of other citizens of the United States who are residents of another state. For example, the vote of a citizen residing in the State of New York relates to, and can affect, the election of 43 electors and the consequent casting of their 43 electoral votes as a single block in the Electoral College, while the vote of a citizen residing in Virginia relates to, and can affect, the election of only 12 electors and the consequent casting of their 12 electoral votes as a single block in the Electoral College.

23. Said state-wide general ticket system of electing electors in Virginia, in violating the "one-man one-vote" principle of the Equal Protection Clause, and other provisions of Section 1, of the Fourteenth Amendment of the Constitution of the United States, irreparably and prejudicially injures plaintiffs and their fellow citizens of the United States resident in Virginia in that, with all Congressional districts in the United States required to be essentially equal in population, approximately 10 times as many citizens must vote for a particular party's nominees for President and Vice President in Virginia as in Delaware, or Vermont, or Wyoming, or Nevada, or Alaska (each of which has only one Congressional district), before their voting can have any positive effect or weight whatsoever in the election of the President and the Vice President through a vote or votes cast in the Electoral College.

24. Said state-wide general ticket system of electing all electors of a state puts a premium on fraud in elections, and exaggerates beyond all reason the power of splinter parties, which can affect the whole electoral vote of a state through control of the relatively small margin of the winning plurality of the State's entire popular vote, as in the 1948 elections when the supporters of Henry Wallace effectively held the balance of power in New York State between Truman and Dewey with their 509,000 votes, drawn primarily from Truman, throwing the 47 electoral votes of New York to Dewey who had a plurality of only 61,000 votes over Truman out of the total of approximately 6,100,000 votes cast in the State.

25. If, on the other hand, one elector were elected solely in and from each Congressional district in the United States and all additional electors to which the state is entitled were elected on a state-wide basis, each citizen of the United States, without regard to his state of residence, would normally vote only for three (3) electors, one on a district basis equivalent to his Congressional district's one representative in Congress, and two on a state-wide basis equivalent to his state's two United States senators. Of course, if any representative-at-large were required to be elected by a state-wide vote, an additional elector would be elected by a state-wide vote. In any event, if a plurality in a Congressional district voted for the elector from that district who was of a different national political party from that party voted for by a plurality of all the state's voters, the elector from such district would cast his vote in the Electoral College for the presidential and vice-presidential nominees of a different political party than would the electors chosen on a state-wide basis.

26. Thus, if the state-wide general ticket system were enjoined as unconstitutional, as prayed herein, the election of one elector in, and solely by the voters of, each Congressional district would provide both an essentially equal basis

oting for electors of the President and the Vice Presi-
by all citizens of the United States, regardless of their
e or state of residence, and also the maximum oppor-
ty for an effective voice of the voters determined and
ıted on the basis of essentially equal districts smaller
the state, not diluted and debased by being regimented
one massive hopper for counting and determining solely
state-wide basis a single voice of the state, and, there-
, effectively expressive of their views and interests as
ens of the United States resident in respective Con-
sional districts and not solely as citizens of the state
nitted only one voice.

.. Such election of one elector in, and solely by the
rs of, each Congressional district would then conform
ıe practice of election of electors by districts originally
ɔted and followed in the Commonwealth of Virginia in
irst three presidential elections in the United States.
ımber of the other states also elected electors in, and
y by the voters of, respective districts in a number of
arly presidential elections prior to 1836. A district
od of election of electors, when adopted by the State of
igan, was ruled constitutional in McPherson v. Blacker,
J.S. 1, 13 S. Ct. 3, 36 L. Ed. 869 (1892).

The state-wide general ticket system of electing elec-
ınd the consequent casting of all electoral votes of
e for the nominees for President and Vice President
political party inequitably and unconstitutionally pre-
even the possibility that more than one nominee for
ent might receive any of the electoral votes of such
in contravention of the clear provision of the Twelfth
lment of the United States Constitution contemplat-
ıt two or more nominees for president, and/or two or
ıominees for vice-president, may each receive one or
ɔf the electoral votes of a particular state, as ex-
l in the mandatory provision thereof that the electors
respective state "shall name in their ballots the per-

27A

son voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of *all* persons voted for as President, and of *all* persons voted for as Vice President, and the number of votes for *each*, . . ."

29. By reason of the foregoing premises, there exists between the parties plaintiff and the parties defendant in this action an actual justiciable controversy within the purview of the Declaratory Judgment Act, Section 2201 of Title 28 of the United States Code, and the plaintiffs are entitled to have their rights in this action adjudged and declared herein.

30. Plaintiffs and all others in the Class represented by them will suffer irreparable injury and immeasurable damages until fair, just and equitable weight is assured for their votes, and constitutional representation is assured to them and all other persons in their respective Congressional districts, in presidential elections by the election solely in and by each respective Congressional district of district electors representative of them as citizens of the United States by the granting by this honorable Court of the relief requested herein. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs, in behalf of themselves and of all other citizens of the United States resident in Virginia, pray that this honorable court:

1. Adjudge, declare and decree

(a) The rights of the plaintiffs in the premises when voting for electors for the election of the President and the Vice President of the United States under the provisions of the Constitution of the United States, of the laws of the United States, and of the election laws of Virginia.

(b) That the election laws of Virginia pertaining to presidential elections are inequitable, unrepresentative, illegal and unconstitutional insofar as they provide that

(i) each and every voter in the Commonwealth may vote for one elector from each and every Congressional district of the state

(ii) the official ballot for election of electors shall be uniform throughout the state,

(iii) the names of all the electors nominated by each political party or group shall appear on the ballot following the name of the party or group and the names of its nominees for President and Vice President, with a square printed only preceding the name of each political party or group, and a marking in such square shall be counted as if squares preceding the names of all of the individual electors nominated by such party or group had been so marked.

(c) That the plaintiffs as citizens of the United States and residents of Virginia are entitled under the provisions of the Constitution of the United States and of the laws of the United States, to have one elector chosen from, and elected by a plurality solely of the voters voting in, the respective Congressional district in which they reside and elect their Representative to Congress.

2. Enter a decree enjoining the defendants and each of them in their capacities as officers, or as a separate and permanent official board, of the Commonwealth of Virginia

(a) from continuing to provide for each and every voter in the Commonwealth to vote for one elector of President and Vice President from each and every Congressional district of the State;

(b) from continuing to prevent, by any means, the election of one elector of President and Vice President chosen from each Congressional district by a plurality

solely of the voters in the respective Congressional district in which they reside and also elect their Representative to Congress;

(c) from continuing to provide an official ballot for election of electors of President and Vice President that is uniform throughout the state;

(d) from continuing to provide that the names of all electors of President and Vice President nominated by each political party or group as from one of the respective Congressional districts shall appear on the official ballot in each county, city and Congressional district in the state and can be voted for only on a state-wide basis by all voters in the state and solely as a single block together with all other such electors of the state by a single marking on the ballot in the square preceding the name of the respective political party or group by which such list of electors were nominated.

(e) from continuing to provide that a vote marked on an official ballot in a presidential election in the square preceding the name of the political party or group of the voter's choice shall be counted as if squares preceding the names of the individual electors nominated by such party or group as from any Congressional district, other than the one Congressional district in which such voter has voted, had been so marked.

(f) from continuing to count a vote marked on an official ballot in a presidential election in the square preceding the name of the political party or group of the voter's choice as constituting a vote for any of the individual electors nominated by such party or group as from any Congressional district, other than for the one individual elector so nominated by such party or

group as from the one Congressional district in which such vote shall have been cast.

3. Such other, further and different relief as this honorable Court may deem equitable, constitutional and appropriate in the premises.

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(Exhibits A and B Follow)

Exhibit A

COMMONWEALTH OF VIRGINIA

SAMPLE BALLOT

POWHATAN COUNTY

GENERAL ELECTION

Tuesday, November 3, 1964

FOR PRESIDENT AND VICE-PRESIDENT

☐ **Democratic Party**

(Electors for LYNDON B. JOHNSON for President, and HUBERT H. HUMPHREY for Vice-President)

At Large.....CHARLES R. FENWICK
At Large.....WILLIAM W. JONES
1st District....HOWARD H. ADAMS
2nd District....EDWARD L. BREEDEN, JR.
3rd District....DR. RUSSELL V. BOWERS
4th District....N. G. HUTCHESON
5th District....J. GARNETT DAVIS
6th District....J. E. GENE TYLER
7th District....CHARLES H. DAVIDSON, JR.
8th District....RANDOLPH H. PERRY
9th District....TOM B. FUGATE
10th District....RALPH G. LOUK

☐ **Republican Party**

(Electors for BARRY M. GOLDWATER for President, and WILLIAM E. MILLER for Vice-President)

At Large.....FRANK GRAVELY
At Large.....WILLIAM A. QUICK
1st District....MRS. JENNINGS RICH
2nd District....B. B. LIPSCOMB
3rd District....J. CALVITT CLARKE
4th District....CHARLES E. HUNTER
5th District....JOSEPH C. LUMPKIN
6th District....E. D. HILTEN
7th District....D. WAMPLER EARMAN
8th District....ROBERT R. HARMON
9th District....DAVID H. FRACKLETON
10th District....CARL A. MARSHALL

☐ **Socialist Labor Party**

(Electors for ERIC HASS for President, and HENNING A. BLOMEN for Vice-President)

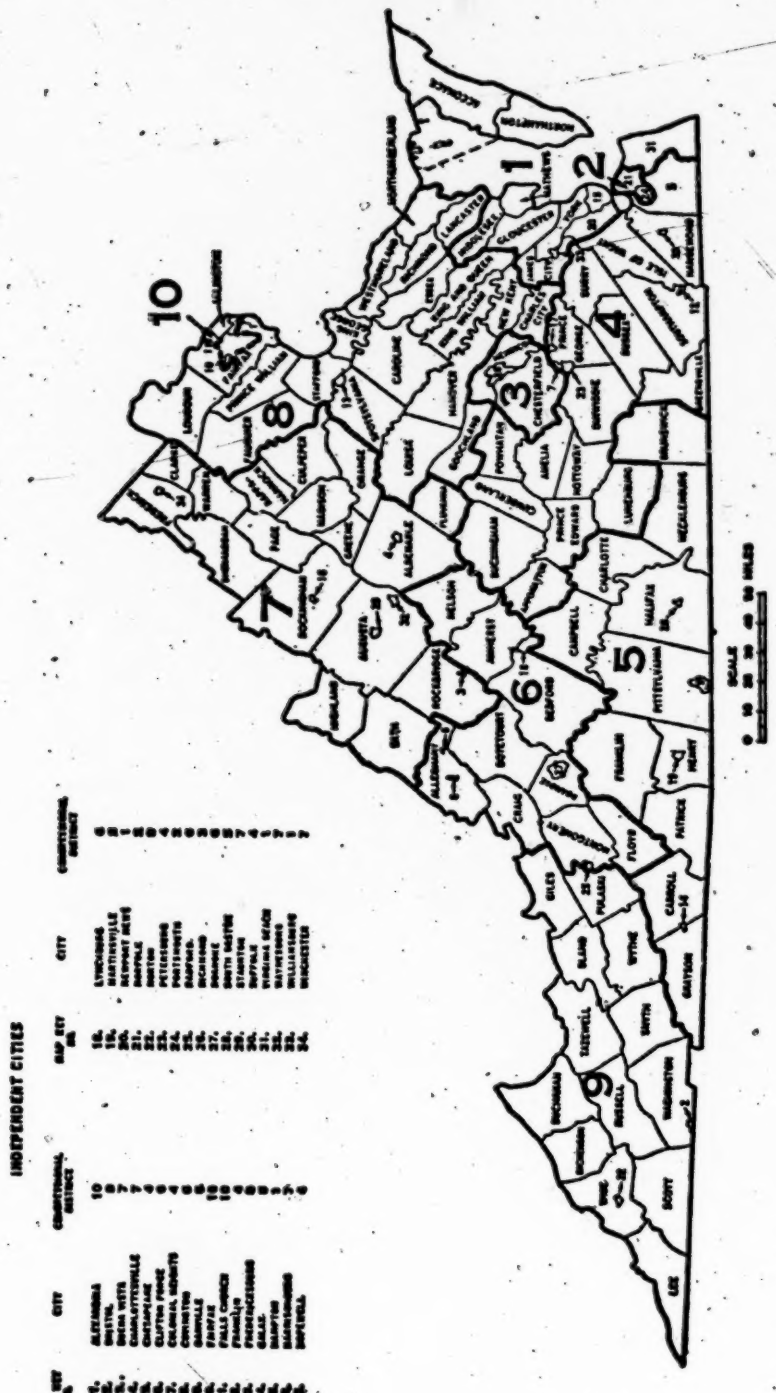
At Large.....MELVIN L. MAUCK
At Large.....ELIZABETH DORN
1st District....EDWARD A. DORN
2nd District....EDWARD SOLOMON
3rd District....WILLIAM C. GRIGG
4th District....ETHEL B. GALBRAITH
5th District....WILLIAM H. WOODING
6th District....WILLA H. OWENS
7th District....URIAH McKENDALL WESTBROOK
8th District....JOHN H. BACHELDER
9th District....MARY BARHAM
10th District....PHILLIP HARDING CATE

Exhibit B

Maps of Congressional Districts 869

VIRGINIA

(10 districts)



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 733

J. HARVIE WILLIAMS, JULIUS PRUFER, EDWARD WEST, JR., CECIL C. HATFIELD, ROBERT A. PECK, BERNARD W. FREUND, GRACE T. SEAT, GRAYSON G. FENTRISS, WILLIAM GROSSMAN, AND JOE E. SWIGER, all citizens of the United States resident in Virginia,
Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, L. STANLEY HARDAWAY, Secretary, MILLS E. GODWIN, JR., Governor of the Commonwealth of Virginia, and MARTHA BELL CONWAY, Secretary of the Commonwealth of Virginia,
Appellees

On Appeal From the United States District Court for the Eastern District of Virginia, at Alexandria

PETITION FOR RECONSIDERATION AND A HEARING

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February 7, 1969

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STATUTES:

2 U.S.C.A. 2a, Apportionment Act of June 18, 1929 9, 10, 14
2 U.S.C.A. 2c, Act of December 14, 1967, P.L. 90-196 81 Stat. 581 ..... 10, 11, 14
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Apportionment Act of June 25, 1842, 5 Stat. 491, c.47, R.S. # 23. See Notes, 2 U.S.C.A. 3 8

MISCELLANEOUS:

Spering, How to Make the Electoral College Constitutionally Representative, 54 A.B.A.J. 763 (August 1968), Reprinted in the Congressional Record:
Vol. 114, No. 140, August 22, 1968, page E 7565
Vol. 114, No. 160, September 30, 1968, page S 11668
Vol. 115, No. 10, January 16, 1969, page H 336 7, 15

Senator Karl E. Mundt, What to Do About the Electoral College, Congressional Record, Vol. 114, No. 160, September 30, 1968, page S 11665 et seq. 7

House of Representatives, House Report No. 909, 27th Congress, 2nd Session, entitled "Apportionment Bill" and dated July 16, 1842 8

Letter dated August 23, 1823 from James Madison to George Hay, from Vol. IX The Writings of James Madison, by Gaillard Hunt, page 147, at pages 151 and 152. 14

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Appellees

On Appeal From the United States District Court for the Eastern District of Virginia, at Alexandria

PETITION FOR RECONSIDERATION AND A HEARING

The appellants hereby petition this Honorable Court to reconsider its action of January 13, 1969 on their appeal in this case, and to grant appellants an opportunity to present their case on the merits in briefs and

oral argument. This case has come before the Court only upon appellants' Jurisdictional Statement filed November 12, 1968, which was addressed simply to the two questions of jurisdiction and substantiality.

I. ACTION OF THE SUPREME COURT

On January 13, 1969, the Supreme Court entered a Per Curiam decision in this case as follows:

"The judgment is affirmed".

This positive action by the Court appears necessarily to constitute a determination by the Court:

(a) that the Court has jurisdiction of this appeal, and

(b) that the questions involved are sufficiently substantial that the Court has, in fact, taken jurisdiction of the case on this appeal.

It is believed that the Court would not and could not enter such a decision and order of positive action if the Court did not, in fact, have and take jurisdiction of the case. Further, it is appellant's understanding that the Supreme Court will generally decline jurisdiction when the constitutional questions are not substantial. *Zucht* v. *King,* 260 U.S. 174, 43 S. Ct. 24 (1922). If the constitutional questions are not substantial, it is believed that the Court would enter an order denying or dismissing the appeal, but would not, on its motion alone, take positive action on the merits of the case by affirming the judgment below.

II. APPELLANTS' RIGHT TO APPEAL

Section 28 USCA 1253, under which this case has been presented to the Supreme Court on this appeal, provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injuncion in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

This statutory provision has generally been referred to as creating a "right to appeal" directly to the Supreme Court in any case properly qualifying under it as being within the jurisdiction of this Court. As declared in *Radio Corporation of America* v. *U. S.*, 95 F. Supp. 660 (D.C. Ill. 1950), affirmed in 341 U.S. 412, 71 S. Ct. 806, a decision by a three-judge court in any such case is appealable to the Supreme Court "as a matter of right". See also *Ryan* v. *Pennsylvania Public Utility Commission,* 44 F. Supp. 912 (D.C. Pa. 1942), appeal dismissed in 317 U.S. 702, 63 S. Ct. 162.

It is respectfully submitted that appellants' "right to appeal" under the cited statute, has been implicitly confirmed by the Supreme Court's action in this case. But such right of appeal is made meaningless if appellants are denied the opportunity to present their case on the merits under the United States Constitution by the filing of briefs and by oral argument.

If the appellees had filed a motion to affirm the judgment below, the appellants would have been permitted to file briefs opposing that motion, as provided in clause 4 of Supreme Court Rule 16. Such briefs could then have gone into the merits of appellants' case under the

Constitution on a limited basis, though beyond anything that was appropriate in its Jurisdictional Statement. However, the appellees made no filing of any motion to dismiss or to affirm. In view of this fact, it must be concluded, at the very least, that appellees did not choose to take any action in opposition to the appellants' statutory right to present their case on appeal to the Supreme Court in full on the merits through briefs and oral argument.

Of course, one recognizes too that a decision of the Supreme Court ruling in favor of plaintiffs' contentions under the Constitution, after plenary consideration on briefs and oral argument, would constitute "the law of the land" and could be readily *made effective as to all states* of the United States prior to the next election of the President and Vice President in 1972. Consequently, it is possible that the appellees might welcome a determination by the Supreme Court on the merits of the issues raised herein, although they opposed appellants' position in the lower court since a decision in appellants' favor in that court prior to the election in November 1968 could not have been made to apply as to all other states prior to that election.

Indeed, the lower court itself placed significant emphasis in its decision upon this point by stating that any limitation on the selecion by a state of presidential electors "must be nationwide". Placing these remarks in the penultimate paragraph of its opinion suggests the importance of this practical point in the minds of the judges of the lower court in reaching their decision. See the last paragraph on page 12a of the Appendix to appellants' Jurisdictional Statement.

In any event, the Supreme Court is the supreme judicial authority for the protection of the rights of

individuals against the stronger powers of others, whether individual, corporate, associative, or government, and for the protection of minorities against any unnecessary discounting or expropriation of their strength in favor of majorities.

Appellants' plea in this case is for the protection of the value of their votes as citizens of the United States in national elections of the President and Vice President against expropriation at the state level, of the strength of the number of persons their votes represent, by the majority or plurality of the votes of the citizens of the state as a whole. In the recent past this Court has faithfully heard the pleas of minorities for comparable protection and relief within the confines of the provisions of the Constitution.

The concerns of the public for more effective and fair representation of the people in the national elections of the President and Vice President through the removal of unnecessary inequities and weaknesses in the present system, have been extensively and continuously expressed in the press and other communications media before and since the recent election. Both houses of Congress have reflected this concern by undertaking hearings on the subject. The questions involved in this case are, beyond any doubt, *substantial* in the minds of the mass of the people and, possibly, even critical to the future stability of our national government.

This Court should not refuse to grant to appellants their right to appeal and to be heard in full in so important a question. This Court should not fail to act for the protection of the strength of minorities in the electoral system, if *any* basis for such action can be found in the Constitution.

III. CONSTITUTIONAL QUESTIONS RAISED ARE SUBSTANTIAL

A. The Apportionment Provisions of Section 2, Article I and of Section 2, Fourteenth Amendment Apply to "Representative" Electors of the President.

The pertinent provisions of Section 2, Article I of the Constitution, as amended by Section 2, Fourteenth Amendment, require apportionments of Representatives as follows:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. The actual Enumeration shall be made within three years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten years, in such Manner as they shall by law direct. . . ."

Under those Constitutional provisions Congress has the power to effectuate such apportionments according to the numbers of persons "in such manner as they (the Congress) shall by law direct". The provisions of every apportionment act enacted by Congress operate functionally also as provisions for apportionment of counterpart "Representative" electors of the President according to the number of persons in each state, even though such electors of the President are not specifically mentioned either in the above quoted provisions of the Constitution or in such apportionment acts. Section 1 of Article II of the Constitution, creating the offices of the counterpart "Representative" electors of the President, could not have made them more closely bound to, and inseparable from, the apportionment pro-

visions, acts, and procedures enacted by Congress as applying with respect to Representatives in Congress.

For a discussion of this point and of the substantive right of the people as citizens of the United States to elect one such elector apportioned to them according to their numbers who constitute their respective Congressional districts, see Spering, How to Make the Electoral College Constitutionally Representative, 54 A.B.A.J. 763 (August 1968), reprinted in the Congressional Record by Senator Bartlett (Alaska) in Vol. 114, No. 140 for August 22, 1968 at page E 7565, by Senator Mundt (South Dakota) in Vol. 114, No. 160 for September 30, 1968 at page S 11668, and by Representative Rarick (Louisiana) in Vol. 115, No. 10 for January 16, 1969 at page H 336.

Senator Mundt's presentation of that A.B.A.J. Article in the September 30, 1968 issue of the Congressional Record is part of his extended remarks on What To Do About the Electoral College, which commences on page S 11665, and in which he has had printed in full (on page S 11667) two very important statistical exhibits that are parts of the extensive record of factual evidence of the submergence of minorities proved in appellants' case in the lower court. These exhibits show the glaring fact, summarized in paragraph 5 on page 11 of appellants' Jurisdictional Statement, that the winning pluralities in from 38 to as many as 146 national (Congressional) districts, in the elections of 1952, 1956, 1960 and 1964, were totally lost to an opposing party's nominee by the overriding statewide vote, however small the latter's margin of victory.

B. The Significance of the Apportionment Provisions of the Constitution Is Substantial

In effectuating such apportionments, Congress provided that Representatives shall be elected by districts composed of a contiguous and compact territory, *and* containing as nearly as practicable an equal number of inhabitants, and that said districts shall be equal to the number of Representatives to which the state may be entitled in Congress, *no district electing more than one Representative.* See Apportionment Act of August 8, 1911, in Note in 2 U.S.C.A. 3, and earlier acts, starting with the Apportionment Act of June 25, 1842, 5 Stat. 491, c.47, R.S. #23.

Each of the above recited elements, which were contained in the 1842 Apportionment Act, was certainly regarded by Congress as a part of the constitutionally-established principle of apportionment. Indeed, the Report of the Select Committee of the House of Representatives concerning that Act of June 25, 1842 contained, in House Report No. 909 dated July 16, 1842 after President Tyler had approved the Act, in the words of the Committee's Chairman, John Quincy Adams, the former Senator and President, the following.

> "The President announces that one of his reasons for entertaining deep and strong doubts of the constitutionality of the law which he has approved and signed is, that it purports to be mandatory on the States to form districts for the choice of Representatives in single districts.
>
> "The committee believe this to be by far the most important and most useful provision of the act. They believe, indeed, the establishment of the principle absolutely indispensable to the preservation

> of this Union. The representation of the people by single districts is undoubtedly the *only* mode by which the principle of representation, in proportion to *numbers,* can be carried into execution. . . .
>
> "*Should the general ticket system universally* prevail, it is obvious that the representation in this House will entirely change its character, from a representation of the people to a representation of States, and transform the constitutional Government of the United States into a mere confederation like that which, fifty-four years ago, fell to pieces for the want of ligatures to hold it together."

These certainly are *not* statements of an insubstantial constitutional question!

Today, appellants' case has been pursued in the lower court and in this appeal with the express endorsement and support of eleven United States Senators, each of whom signed the letter dated May 16, 1968 to the American Good Government Society, a true copy of which is hereto attached, marked Exhibit A, and made a part hereof. These Senators, thus, have expressed their recognition of the *substantial* constitutional questions involved in appellants' case, and the need for their proper resolution.

The above recited elements of the apportionment were omitted from the Apportionment Act of June 18, 1929. But the Supreme Court, in its decision in *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S.Ct. 526 (1964) found and ruled that the command of Article I, Section 2, which (as amended by Section 2 of the Fourteenth Amendment) includes the above quoted apportionment provisions of the Constitution, nevertheless requires that the Congressional districts in each of the states

shall be essentially equal, or as nearly equal as is practicable. Footnote 10 of the opinion shows that the Court did not need to reach the arguments based on the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment. Thus, the *Wesberry* decision was based on the basic structure of the government as provided in Article I, and not upon the Fourteenth Amendment protections of civil rights of individuals. Implicit in its requirement of essential equality of districts appears to be recognition of a constitutional requirement of districts as the people's national voting units where apportionment to the people, according to their numbers, is effective under the Constitution.

Similarly, it is submitted that the basic principle of the apportionment provisions of the Constitution also requires that no district shall elect more than one Representative. Congress has recently re-enacted this requirement by amending the Apportionment Act of 1929 in the Act of December 14, 1967, P.L. 90-196, 81 Stat. 581, 2 U.S.C.A. 2c, as follows:

> "In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to section 2a(b) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected *only* from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress)". (Italics supplied)

Thus, Congress today does not consider election of Representatives by single-member districts, as opposed to statewide or at-large elections, an insubstantial Constitutional question! And, contrary to the statement of the lower court in the immediate case (page 11a of the appellants' Appendix), in that recent Act, 2 U.S.C.A. 2c, Congress has *not* expressly countenanced the election of Representatives from the State at large. In fact, it requires election by single-member districts *in all states* in all elections *after* the one in November 1968 in which the Ninety-first Congress was elected.

Mr. Justice Douglas, in his dissenting opinion in *Fortson* v. *Dorsey*, 379 U.S. 433, 440, 85 S.Ct. 498, 502 (1965) considered that elections in multi-member districts effectuated "invidious discrimination" as against single-member district elections, and would have ruled them unconstitutional.

In *Burns* v. *Richardson*, 384 U.S. 73, 89, 86 S.Ct. 1286, 1295 (1966), the Supreme Court, in footnote 14, stated:

> "Appellant Burns concedes in his brief that '(i)n the case of the Hawaii House multi-member districts, extensive proofs were not put in as to the details of the submergence of minorities.' There may, for example, be merit in the argument that by encouraging block voting, *multi-member districts diminish the opportunity of a minority party to win seats.* But such effects must be demonstrated by evidence." (Italics supplied).

It is submitted that the record in this case is replete with positive evidence, and findings by the lower court, of the "submergence of minorities" by the winner-take-all system of electing presidential electors estab-

lished by state statute. Ample evidence in this case demonstrates that at-large elections of "Representative" electors of the President, which are multi-member district elections, "diminish the opportunity of a minority party to win seats" of electors of the President. A greater diminishment than total destruction of the strength of any minority party could not possibly be found. Total isolation of the strength of any such minority party from either the majority or minority party in other states further emphasizes the invidious character of the system.

The Supreme Court's decision in *Colegrove* v. *Green*, 328 U.S. 549, 553, 66 S.Ct. 1198, 1200 (1946), speaking through Mr. Justice Frankfurter, was strongly dictated by its recognition that the evils of at-large elections of Representatives are worse than the election of Representatives by substantially unequal districts, stating as follows:

> "At best we could only declare the existing electoral system (of unequal districts in Illinois) invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket. *The last stage may be worse than the first.* The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting. This requirement, in the language of Chancellor Kent, 'was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave *the aggregate minority of the people* in a state, though approaching perhaps to a majority, to be *wholly overpowered by* the combined action of *the nu-*

> *merical majority,* without any voice whatever in the national councils.' 1 Kent, Commentaries (12th ed., 1873) *230-31, n. (c)." (Parenthetical material and italics supplied).

C. Some Significant Lower Court Errors

The lower court erroneously refers (page 6a of appellants' Appendix) to Thomas Jefferson as one of the "many Brahmins of the Constitutional Convention" along with James Madison and James Wilson. The lower court then places great importance upon Jefferson's advice to Virginia (in January 1800) to switch from district election of its electors to the general ticket system of electing all such electors on a statewide or at-large basis, as demonstrating that, quoting from page 7a of the Appendix:

> "Thus, it cannot be safely said that the draftsmen of Article II, Section 1 believed that the electors must be chosen by congressional or other districts, as plaintiffs here contend."

But, Thomas Jefferson (again referred to by the lower court at page 12a of the Appendix) was *not* a draftsman of the Constitution. Indeed, he was *not* even a participant at the Constitutional Convention at any time!

James Madison and James Wilson, on the other hand, were two of the most active participants and draftsmen of the Constitution. In fact, James Wilson of Pennsylvania, the highly-respected lawyer-framer of the Constitution who later became an Associate Justice of the United States Supreme Court, presented the first proposal of the idea of an electoral college for the election of the President when, early in the Convention on June

2, 1787, he made a motion that the states be divided into districts and that the persons in each district "elect members for their respective districts to be electors of the Executive magistracy, . . ." Moreover, James Madison, who apparently attended every session of the Constitutional Convention and provided us the most comprehensive Notes of each day's activities, wrote in a letter to George Hay, dated August 23, 1823, concerning the method of electing electors of the President:

> "The district mode was mostly, if not exclusively in view when the Constitution was framed and adopted; & was exchanged for the general ticket & the legislative election, as the only expedient for baffling the policy of the particular states which had set the example."

The lower court has chosen to ignore the foregoing important statements of these two actual participants in the Convention and draftsmen of the Constitution. As pointed out above, the lower court *erroneously* stated (page 11a of the Appendix) that Congress has expressly countenanced election of Representatives from the "State at large", whereas the Act of 1967, amending the Apportionment Act of 1929, now requires that no district elect more than one Representative.

The lower court, in its opinion, has completely overlooked and failed to discuss the appellants' above argument based upon the importance of the apportionment provisions of the Constitution to the basic character of representation of the people by single-member districts in the election of Representatives and in the election of the counterpart "Representative" electors of the President, although this argument was fully presented in the briefs and argument before the lower court. It was, of

course, also presented in lesser detail in appellants' Jurisdictional Statement.

The lower court also gave no attention in its opinion to the argument, presented by appellants, that the language of the Twelfth Amendment clearly provides for, and anticipates, divisions of the votes of the electors of a state among two or more nominees for President, and that state election laws *designed to preclude any such division* of the state's electoral votes are contrary to the *divisibility principle* of that Amendment.

CONCLUSION

The time limit (25 days) for preparing and filing this Petition for Reconsideration does not permit a comprehensive presentation herein on the merits of all the many important elements in support of appellants' appeal in this case on the facts and under the constitution. Furthermore, the purpose of this Petition is appropriately to urge this Honorable Court to permit appellants to present their case, in due course under the Court's Rules, in full on the merits by briefs and oral argument.

As has been pointed out in 54 A.B.A.J. 763 (August 1968) and on page 20 of appellants' Jurisdictional Statement, unless and until the disproportionate and unrepresentative power captured by slim pluralities (controllable in some states by organized political leaders) under the present winner-take-all system can be effectively broken under the present provisions of the Constitution, the great current efforts in Congress to amend the Constitution, with regard to this and other critical weaknesses in the processes of electing our Presidents, may be expected to wither away with-

out success as in all such previous great efforts mounted over the last 150 years. The leadership of some of the larger states has always been able to prevent any such constitutional amendment from achieving the necessary two-thirds vote in the House of Representatives where their strength is greatest.

The people, however, have a great Constitution of the United States that contains provisions for apportionment of Representatives and of counterpart "Representative" electors, according to the number of persons. Districts of the people composed of essentially equal numbers of people have been recognized by this Honorable Court as required under those provisions of Article I of the Constitution, as Congress had earlier found and declared. Congress has also found and declared that such constitutional apportionments call for and require single-member districts, *no district electing more than one* officer.

This Court should not shrink from examining this substantial question, of the gravest concern to the people. A decision by the Supreme Court ruling the winner-take-all system to be unconstitutional and requiring election of the counterpart "Representative" electors of the President by single-member national (Congressional) districts, would constitute the *gateway* decision that is necessary to enable the people to effectuate amendments of the Constitution to correct the critical weaknesses of the present system of electing our Presidents.

WHEREFORE, the appellants pray that this Honorable Court recognize that the questions presented herein are substantial and require plenary consideration, beyond the presentations possible or appropriate in this or ap-

pellants' earlier filing, for their resolution, and grant appellants the right on this appeal to submit their case in full on the merits by briefs and oral argument.

Respectfully submitted,

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Attorneys for Appellants

February 7, 1969

Certificate of Good Faith

The undersigned counsel for the appellants hereby certify that the within Petition for Reconsideration and a Hearing is presented in good faith and not for delay.

HOWARD S. SPERING

ROBERT L. MONTAGUE, III

EXHIBIT A

UNITED STATES SENATE
WASHINGTON, D. C. 20510

KARL E. MUNDT
Madison, South Dakota

R. L. MCCAUGHEY
Administrative Assistant

ROBERTA VAN BEEK
Executive Secretary

WALTER C. CONAHAN
Press Secretary

ROBERT E. RUDDY
Legislative Assistant

Member:

Appropriations Committee

Foreign Relations Committee

Government Operations Committee

Senate Investigations Subcommittee

Advisory Commission On
Intergovernmental Relations

May 16, 1968

The Honorable Charles E. Potter
Chairman, Board of Trustees
American Good Government Society
515 Dupont Circle Building
Washington, D. C. 20036

Dear Senator Potter:

We wish to commend the American Good Government Society for its excellent work over many years toward making the Electoral College constitutionally representative of the United States in electing the President. More than anyone else the Society has emphasized the supreme importance of the Electoral College in our constitutional structure, as essential to effect the separation of Executive and Legislative powers, and to place them on the same foundation in the electorate.

As sponsors of a Constitutional Amendment to conform the President's constituency to that of the two Houses of Congress (and to move a contingent election of the President from the House of Representatives voting by States, to a joint session of Congress with each member having one

vote), we endorse your initiation and support of the Virginia Electoral College suit in the United States District Court in Alexandria. That case and similar suits in other States will have enormous value in educating the American public on this most vital question in our constitutional polity.

We are indeed pleased that the Virginia case will be heard on June 25 by a special three-Judge Court. We hope that the case will be on appeal in the United States Supreme Court when its Fall Term begins in early October. A favorable decision there would require the election of a representative Elector in each of Virginia's ten Congressional Districts. This would mean, in time, that all 435 representative Electors would be elected in Congressional Districts—not statewide as now—and that the Electoral College would be constitutionally representative of the United States.

/s/ KARL E. MUNDT
Karl E. Mundt, U.S.S.

/s/ NORRIS COTTON
Norris Cotton, U.S.S.

/s/ CARL T. CURTIS
Carl T. Curtis, U.S.S.

/s/ PETER H. DOMINICK
Peter H. Dominick, U.S.S.

/s/ HIRAM L. FONG
Hiram L. Fong, U.S.S.

/s/ ROMAN L. HRUSKA
Roman L. Hruska, U.S.S.

/s/ LEN B. JORDAN
Len B. Jordan, U.S.S.

/s/ THRUSTON B. MORTON
Thruston B. Morton, U.S.S.

/s/ JOHN STENNIS
John Stennis, U.S.S.

/s/ STROM THURMOND
Strom Thurmond, U.S.S.

/s/ JOHN G. TOWER
John G. Tower, U.S.S.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

WILLIAMS ET AL. *v.* VIRGINIA STATE BOARD OF ELECTIONS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 733. Decided January 13, 1969.

PER CURIAM.

The judgment is affirmed.